

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPEALANTE SIDE

APPEAL FROM ORDER NO.918 OF 2005
WITH
CIVIL APPLICATION NO.1072 OF 2005

Sou. Housabai @ Kamalabai Bhimrao Patil. ...Appellant.
Vs.
Sampat Babu Sawant. ...Respondent.

....
Mr.R. V. More for the Appellant.
Mr.D. S. Sawant with Mr.Rahul Walwalkar for the Respondent.

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CORAM : DR. D.Y. CHANDRACHUD, J.

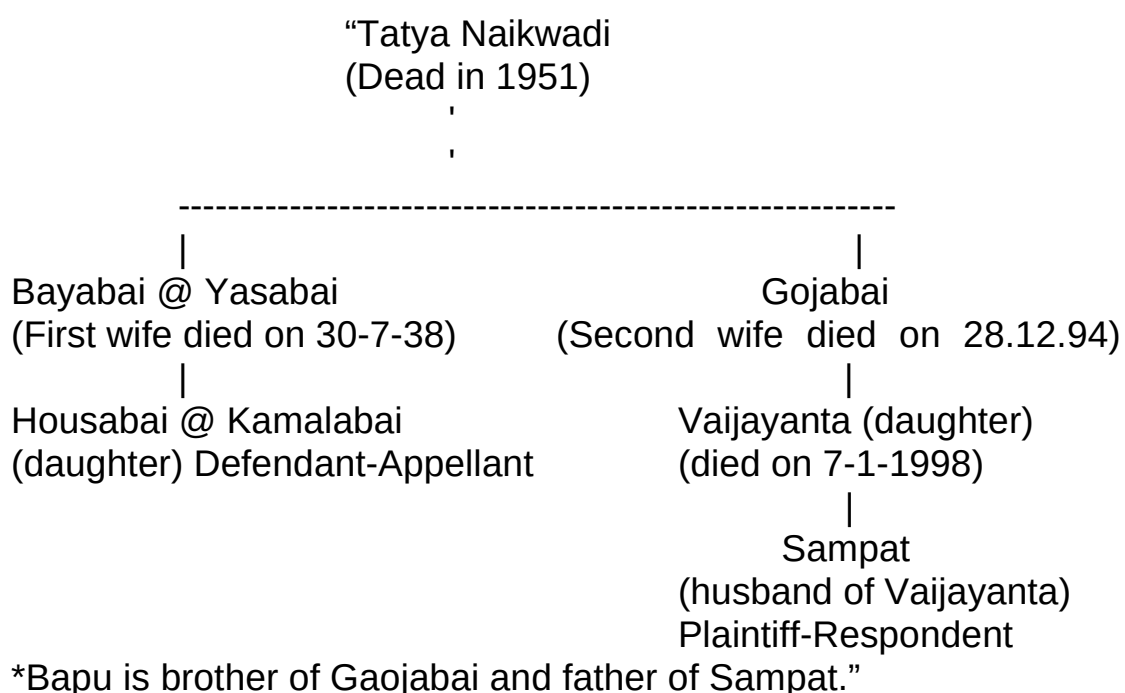
November 23, 2005.

P.C.:

Admit. By consent taken up for hearing and final disposal.

This appeal under Order 43 Rule 1 of the Code of Civil Procedure, 1908 is directed against an order dated 19th July 2005 of the Additional District Judge, Islampur. By the order, the Additional District Judge, has allowed the application for interim relief preferred by the Respondent during the pendency of the appeal and has restrained the Appellant from obstructing the Respondent "from possessing half share in the suit property" till

the disposal of the appeal. In order to appreciate the facts for the purposes of the disposal of the appeal, it would be necessary to note the admitted genealogy. The genealogy is thus:



The common ancestor was Tatya Naikwadi whose first wife expired in 1938. The Appellant, the original Defendant, is the daughter of the first wife. Tatya remarried and his second wife Gojabai expired in 1994. The Respondent who is the original Plaintiff is the husband of Gojabai's daughter Vaijayanta who expired on 7th January 1998. Admittedly, the Respondent and Vaijayanta had no children of their own.

The Respondent instituted a suit for declaration and injunctive relief. During the pendency of the suit, an application for interim relief which was preferred by the Respondent was dismissed by an order dated 17th January 2000. The suit was tried and by an order dated 16th August 2004, the suit has been dismissed. The Learned Trial Judge has taken due notice of the fact that Vaijayanta who was the wife of the Respondent had inherited the suit property from her mother and that accordingly under Section 15(2) of the Hindu Succession Act, 1956, the property shall devolve in the absence of any son or daughter not upon the heirs referred to in sub-section (1), but upon the heirs of the father. Hence, since Vaijayanta had acquired the property from her mother Gojabai and Vaijayanta died without leaving issue, the property devolved on Tatya Naikwadi's heirs.

An appeal has been filed by the Respondent before the Additional District Judge, against the dismissal of the suit. The impugned order of the Additional District Judge, notes in para 5 prima facie that it is the Appellant upon whom the property has devolved under Section 15(2) of the Hindu Succession Act, 1956. Prima facie in view of the provisions of Section 15(2), the

Respondent would not be entitled to any interest in the property since the suit property was acquired by Vaijayanta through her mother. Vaijayanta died issueless and the devolution of the property was, therefore, to be in accordance with Section 15(2).

Now, in so far as the question of possession is concerned, the interim order that was passed by the Learned Trial Judge on 17th January 2005 took due note of the fact that the father of the Respondent-Plaintiff, Bapu had instituted Regular Civil Suit No.148 of 1995 against the Respondent and Vaijayanta contending that he was being obstructed in the possession of the suit property. Subsequently, the Respondent's father Bapu instituted Regular Civil Suit No.56 of 1996 inter alia against the Appellant for a permanent injunction in which there was a claim of ownership and possession in respect of the suit property. The Respondent's father could not establish his ownership and possession and the suit was dismissed.

Prima facie, therefore, the Respondent has been unable to establish his title to the suit property before the Trial Court and the First Appellate Court at the interlocutory stage has found

substance in that finding. It would not be appropriate for this Court to express any conclusive opinion on the issue since the Appeal is still pending. It would appear that prima facie, the devolution of the property after the death of Vaijayanta would have to take place in accordance with the provisions of Sec.15(2), Vaijayanta having died issue less. From the material on the record, there is absolutely nothing to establish that the Respondent has been in possession of the property. Indeed, the finding recorded in the interim order of the Learned Trial Judge dated 17-1-2005 as noted earlier would show otherwise. In these circumstances, the Respondent clearly failed to make out a case for the grant of an interim injunction restraining the Appellant from obstructing the Respondent from "possessing half share in the suit property". The order of injunction is misconceived, since the Respondent has not made out a prima facie case. The balance of convenience is not in favour of the Respondent. This Appeal from Order accordingly has to be allowed and is accordingly allowed and the order of the Additional District Judge, Islampur dated 19th July 2005 is accordingly quashed and set aside. However, it is clarified that all the observations contained in this order are confined to the disposal of the issue which arose at the interlocutory stage during

the pendency of the appeal before the First Appellate Court. These observations shall not come in the way of the disposal of the appeal on merits and the Additional District Judge, shall accordingly dispose of the appeal uninfluenced by the observations contained in this order. The appeal is accordingly disposed of . No order as to costs.

In view of the disposal of the appeal, the Civil Application does not survive and is accordingly disposed of.

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